FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption of Proposed Regulation 18572 Interpreting Section 85702, Contributions from Lobbyists

Date: April 25, 2002

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As the Commission is well aware, passage of Proposition 34 brought significant changes to various aspects of the Political Reform Act ("Act"). Among those changes is a new statute, section 85702 of the Government Code. Generally speaking, the new law prohibits certain, but not all, campaign contributions from lobbyists. The statute also prohibits an elected state officer or candidate for elected state office from accepting a contribution made by a lobbyist. Determining when a lobbyist "makes" a contribution is an important regulatory issue.

Over the course of several meetings, the Commission has considered regulatory language interpreting the prohibition on lobbyist contributions. At its September, 2001, meeting, the Commission held a pre-notice discussion of the issues surrounding implementation of section 85702 and concluded that, at a minimum, section 85702 applied to a lobbyist's use of purely personal funds. The Commission next considered adoption of an emergency regulation at its March, 2002, meeting. After considering language proposed by staff and a proposal by a representative of the lobbyists' interest group, the Commission arrived at a consensus that the prohibition extends beyond the personal funds of a lobbyist. The Commission directed staff to bring back a regulation that incorporated this conclusion in alternative proposals. Staff has noticed regulation 18572 for adoption at this meeting pursuant to the Commission's instructions.[1] This memorandum analyzes the various options open to the Commission and makes recommendations where appropriate.

I. COMMISSION DECISIONS IN MARCH

The Commission made several determinations and gave feedback to guide staff on further drafting. That input is summarized as follows:

- The ban prohibits a lobbyist's use of "personal funds;"

[1] The proposed regulation differs slightly from the noticed version to clarify the language.

- The Commission supports the principles of subdivision (a) of the draft emergency regulation, and believes it should be part of the final adopted regulation;
- Regarding the extent of the prohibition beyond personal funds, the Commission asked staff to draft language providing three options, as follows, analyzing the voters' intent with respect to each:

    1) the prohibition applies to any entity wholly-owned by a lobbyist;
    2) the prohibition applies to an entity of which a lobbyist owns 50% or more; and
    3) the principles of section 85311, the affiliated entities rule, applies generally to any contribution directed and controlled by a lobbyist.

II. SCOPE OF THE CURRENT LOBBYIST CONTRIBUTION BAN AND PROPOSED REGULATION 18572

A. Introduction.

By now, the Commission certainly is familiar with the long history of statutory attempts to govern lobbyist contributions. As demonstrated at the most recent meeting, an understanding of the legislative history is integral to an understanding of the intent of the voters when they adopted Proposition 34 and section 85702. Because this territory is well known to the Commission and because there exists no new information to present with respect to that history, this memorandum does not repeat that discussion here. Rather, the following discussion proceeds from the directive of the Commission in March to discuss the three options of particular interest to the Commission. Where relevant to the analysis, pertinent legislative history and discussion of voter materials will be presented.

B. Regulation 18572.

Proposition 34 added section 85702 to the Act:

> "An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer."

The fundamental question discussed in March and to be decided by the Commission now is how far the ban extends beyond the purely personal funds of the lobbyist. For instance, may a lobbyist contribute funds under his direction and control?

The regulation has been reorganized slightly to make it clearer. Thus, the regulation begins by defining what it means for a lobbyist to "make" a contribution (subdivisions (a)(1) through (a)(3).) Subdivision (b) of the regulation presents optional

language should the Commission decide to apply the affiliated entities rule of section 85311.

Also attached is another draft, "Version 2," which contains a slightly modified version of the regulation proposed by a member of the regulated community at the last meeting. In the interest of thoroughness, staff noticed this additional version even though the Commission seems poised to move forward with the language in the staff-drafted version.

1. Subdivision (a)(1) of Proposed Regulation 18572

This language implements the Commission's earlier determination that the statute applies to the lobbyist's personal funds. **The Commission considered and approved the particular elements discussed below. Subdivision (a)(1) is substantively unchanged from the prior draft endorsed by the Commission at the March, 2002, meeting.**

Elemental to understanding and applying the statute is a definition of what it means to "make" a contribution, and what a "contribution" is. This subdivision describes the elements of the act of making a contribution and refers to the Commission's definition of "contribution" contained in section 82015 and regulation 18215. In so doing, the proposed regulation uses existing principles already interpreting similar provisions in the Act. In the bracketed language, reference also is made to regulation 18533, which governs contributions made from joint checking accounts.[2] This sentence also defines the subdivision's earlier use of the term "personal funds" to mean those funds or assets which are the personal property of the "lobbyist." This language is virtually identical to definitional language already found in regulation 18611, regarding lobbyist reporting of contributions. (Reg. 18611, subd. (b)(3).)

2. Subdivisions (a)(2), (a)(3) and (b) of the Proposed Regulation

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[2] Regulation 18533 states:

"**18533. Contributions from Joint Checking Accounts.**

"(a) A contribution made from a checking account by a check bearing the printed name of more than one individual shall be attributed to the individual whose name is printed on the check and who signs the check, unless an accompanying document directs otherwise. The document shall indicate the amount to be attributed to each contributing individual and shall be signed by each contributing individual whose name is printed on the check. If each individual whose name is printed on the check signs the check, the contribution shall be attributed equally to each individual, unless an accompanying document signed by each individual directs otherwise.

"If the name of the individual who signs the check is not printed on the check, an accompanying document, signed by the contributing individuals, shall state to whom the contribution is attributed.

"(b) For purposes of this regulation, each contributing individual is a 'person' as defined in Government Code section 82047 and is subject to the contribution limitations set forth in Government Code sections 85301 and 85303.

"(c) If the individual who signs the check or accompanying document is acting as an intermediary for another contributor, this regulation shall not apply and Regulation 18432.5 shall apply instead."

These three subdivisions contain the options the Commission wished to reconsider. Together, they comprise **"Decision 1, Options A and B."**

Subdivision (a)(2), **Option A1** provides that a lobbyist "makes" a contribution when the contribution is made by a business entity wholly owned by a lobbyist, and the lobbyist directs and controls the making of the contribution. In the event the lobbyist does not direct the making of the contribution, the contribution will not be prohibited. Under this subdivision, if the business entity is owned in part, however small, by anyone other than a lobbyist, the prohibition would not apply, even if the lobbyist directed the contribution.

The language of **Option A2**, however, applies the prohibition further to include business entities that are "majority owned" by the lobbyist (and where the lobbyist also directs and controls the making of the contribution). (See *infra*, "Analysis," for a discussion of the authority for either option.)

Subdivision (a)(3) of the regulation states a lobbyist "makes" a contribution prohibited by section 85702 if the contribution is comprised of funds of a lobbyist political action committee. The prohibition here would apply only if the committee's funds consist solely of contributions from lobbyists. Therefore, the prohibition would not apply to a lobbyist political action committee if *any* portion of the PAC's funds were raised from non-lobbyists. In this event, so long as any of its funds were from non-lobbyists, a lobbyist could direct and control a contribution from the PAC

Subdivision (b) is an alternative to subdivisions (a)(2) and (a)(3). This subdivision states that the affiliated entities rule of section 85311 applies to any contribution directed and controlled by a lobbyist. Under subdivision (b) of this regulation, contributions from a lobbyist PAC would be prohibited if the contribution were directed and controlled, as defined under section 85311, by a lobbyist. This would apply to a lobbyist PAC even if some of the PAC's funds were obtained from non-lobbyists. This subdivision also would prohibit the same contribution addressed in subdivision (a)(2) above, of course, because the key here is whether the lobbyist "directs and controls" a contribution. As long as a lobbyist directs and controls a contribution, the ownership interest of the particular funds at issue does not matter. (§ 85311, subd. (b).) *If the Commission chooses to add subdivision (b), it will not be necessary to include (a)(2) and (a)(3), as subdivision (b) already encompasses those scenarios.*

C. Analysis.

"Option A" language versus "Option B" Language - Whether Section 85311 Is Being Interpreted

The essential difference between "Option A" and "Option B" is whether the affiliated entities rule of section 85311 is applicable to lobbyists. Put another way, the authority for subdivisions (a)(2) and (a)(3), "Option A," is found in section 85702, the

lobbyist provision itself. The authority for subdivision (b), "Option B," is found in section 85311.

The language of "**Option A**" is based on an interpretation of when, under section 85702, a lobbyist "makes" a contribution. While the Commission may find the affiliated entities rule of section 85311 useful in formulating its decision about what precisely constitutes making a contribution, the authority itself for either **A1** or **A2** rests with the Commission's inherent authority to interpret the term "make" as it is used in section 85702. Insofar as the affiliated entities rule may be seen to act as a safeguard to prevent an end-run around the contribution limits, the Commission may wish to apply a similar safeguard in the context of the lobbyist prohibition. In so doing, the Commission then is left with determining whether the prohibition should apply very narrowly to only wholly owned businesses (**A1**) or whether it applies more broadly to business entities majority owned by a lobbyist (**A2**).

In contrast, **Option B** is based on the Commission's determination that section 85311 applies to all contributions a lobbyist directs and controls. The authority for this interpretation rests squarely on a determination that the voters (unaltered by subsequent legislative amendment) intended the affiliated entities rules of section 85311 to apply when a lobbyist directs and controls contributions of funds that may not otherwise belong to him or her.

Legislative and Voter Intent - Does section 85311 Apply to Contributions Directed and Controlled by Lobbyists?

At the March meeting, the Commission found useful a consideration of the voters' intent in passage of the lobbyist prohibition. The Commission may recall that in the ballot pamphlet materials before the voters in November of 2000 when Proposition 34 passed, the title and summary stated the proposition "[p]rohibits lobbyists' contributions to officials they lobby." (Official Voter Information Guide, 2000 General Election Ballot Pamphlet, at p.12.) The legislative analyst states Proposition 34 "prohibits contributions from lobbyists to state elective officials or candidates under certain conditions." (*Id*., at p. 13.) Proponents of Proposition 34 argue in the ballot pamphlet that "[p]roposition 34 bans lobbyists from making ANY contribution to any elected state officer they lobby" (*Id*., at p.16, emphasis in original) and that "[l]obbyists will be forbidden from making contributions." (*Id*., at p.17.) Other than these statements, nothing in the voter information guide sheds further light on the scope of section 85702 or indicates an intent to limit the lobbyist prohibition to solely personal funds.

One must be mindful, however, that section 85702 was adopted in the context of a larger scheme to govern contributions to campaigns. As part of that scheme, the voters adopted section 85311 in Proposition 34. Section 85311 governs the aggregation of contributions by affiliated entities for purposes of determining whether contribution limits have been met or exceeded. The Commission determined recently that section 85311 attributes to a person only those contributions that the person "directs and controls." For instance, subdivision (b) of section 85311 provides:

> "(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual."

To summarize, if one person effectively dictates the contribution decisions of another, the law requires that their contributions be "aggregated" as the contributions of a single person. When adopted by the voters, this provision applied "for the purposes of this chapter," which included the lobbyist prohibition in 85702. The argument may be made, as supported by the voter materials and the language of sections 85311 and 85702, that the voters intended in Proposition 34 to prohibit contributions directed and controlled by lobbyists. This also is consistent with the purpose of section 85311, which helps to prohibit an end-run around the contribution limits.

Was Section 85311 Narrowed by Senate Bill 34?

Comments by some Commissioners at the March meeting suggest there is support for the notion that, absent the later amendment, section 85311 would apply to prevent contributions directed and controlled by a lobbyist (subdivision (b) of the proposed regulation). The Commission will recall, however, the discussion in March also centered on the impact of the recent legislative amendment to section 85311. Section 85311 was amended by Senate Bill 34 last year to apply no longer "for the purposes of this chapter" but now "[f]or purposes of the contribution limits of this chapter...." (§ 85311, subd. (a).)[3] According to the drafters of the amendment, the purpose of the amendment was to clarify that the aggregation rules of section 85311 apply only for purposes of determining whether a contributor has reached the contribution limits of Chapter 5, as opposed to applying to the reporting rules in that chapter that govern how and when entities must file their disclosure reports. As best as the legislative intent of that amendment can be determined, it appears section 85311 was not amended with the intent to remove section 85702 from the scope of its application. The bill analyses propounded by the respective policy committees as the bill was considered by the Legislature do not mention the lobbyist ban with respect to the amendment of section 85311.[4] Moreover, any amendment to the Act by the Legislature must be done in furtherance of the purposes of the Act. (§ 81012.) Construing the amendment of section 85311 to have narrowed the

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[3] As the Commission is aware, the question arises whether the prohibition in section 85702 is a "ban" or a "limit." If not a "limit," the argument goes, then the affiliated entities rule no longer applies due to the amendment to section 85311 applying only to the contribution "limits" of this chapter. The debate on such a question may be the equivalent of determining whether a glass is "half empty" or "half full." At least one court, for example, has characterized an "aggregate limit on total contributions" to be "a zero contribution limit." *Shrink Missouri Government PAC v. Maupin, et al.* (1996) 922 F.Supp. 1413, 1424.)

[4] Of nine committee and floor analyses, seven contained no reference at all to the amendment of section 85311. Two of the early Senate floor analyses contained a list of changes by the bill, including "[c]larify[ing] that the definition of "affiliated entities" is intended for purposes of the contribution limits." (Sen. Rules Cmte, Floor Analysis, Third Reading, 4/03/01 and 04/04/01.)

applicability of the affiliated entities rule to exclude its application to lobbyists would imply the Legislature's intent to reject the apparent will of the voters in adopting Proposition 34. Such an amendment would be difficult to defend as furthering the purposes of the Act.

Rather, the more logical and defensible interpretation of the amendment to section 85311, in staff's view, is that the Legislature intended to clarify that the affiliation rules apply for purposes of determining whether someone has violated campaign contribution rules, as opposed to reporting rules. This construction attributes an intent to the Legislature to preserve the will of the voters and further the purposes of the Act. It also is consistent with the background, such as it can be determined, of the amendment.[5]

Therefore, to best reinforce the apparent intent of the voters in passing Proposition 34 and the prohibition on lobbyist contributions, **staff recommends the commission reject the language of Option A and adopt regulation 18572 and the optional language of subdivision (b) in Option B.**

[5] Staff does not believe such an interpretation runs afoul of any previous court determinations as to the constitutionality of lobbyist prohibitions. As set forth in the historical discussion in staff's previous memorandum to the Commission dated February 28, 2002, the only version of a prohibition to be permanently struck down was the first incarnation, enacted with the adoption of the Political Reform Act by the voters in 1974. That prohibition applied, for instance, to contributions "arrange[d]" by a lobbyist. While a court later in a decision regarding Proposition 208's version enjoined a similarly-worded statute that applied to contributions "through or arranged by" a lobbyist, the lawsuit was dismissed before a final adjudication was rendered. In its initial determination to enjoin enforcement of the Proposition 208 statute pending a final determination, the court found the statute "severely limited [lobbyists] in their ability to fully participate in conversations" regarding contributions their clients might make. (*California ProLife Council PAC, v. Scully* (1998) 989 F.Supp. 1282, Findings of Fact, 4/5/99, #444.) Because it is staff's opinion that prohibiting a lobbyist from "directing and controlling" a contribution does not prevent a lobbyist from advising a client on the making of a contribution, the concerns expressed by previous courts are not implicated.